IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 630 OF 1998

Ulukuntappa Ullapa Naik & ors. ..Appellants

versus

Smt. Gauramma K. Medar & ors. ..Respondents

Mr. G. R. Rege with Mr. A. S. Khandeparkar for the Appellants.

Mr. Pursnani for the Respondents.

CORAM : D. G. DESHPANDE,J.

DATE : 11TH FEBRUARY,2005

ORAL ORDER :

1. Heard counsel for the appellants and the respondent.

2. Appealnts are the original defendants. Plaintiffs filed a suit against them for getting possession of the suit premises because according to him the defendants were trespassers. The suit premises are "half portion" partitioned from room No.10 being referred to as R. No.10A consisting of tin shed partly made with bricks opposite Ram Mandir, G. D. Ambekar Road, Mumbai 400 012. The suit

premises were the tenanted premises of Shivappa Kumarrappa and the plaintiffs are legal heirs and tenants. the correct position is that there are two room under a one roof. One room is referred to by the plaintiff as 10A and the other as 10B. The plaintiffs are in possession of 10B and defendants are in possession of 10A. According to the plaintiffs the Defendants are trespassers having no semblance of title and therefore they filed the suit.

3. Further the case of the plaintiffs was that the defendants were claiming sub tenancy of 10A, therefore they filed RAD Suit No. 5184 of 1979 before the Small Causes Court at Bombay against one S. G. Keny - the purported landlord and Kumarappa Shivappa - husband of the plaintiff No.1 or father of other plaintiffs for declaration of tenancy and injunction. Initially defendants succeeded in getting injunction against the plaintiffs. Thereafter the suit as against defendant No.2 i.e. Kumar Shivappa was dismissed as abated. Thereafter there was one more order about the dismissal of the suit as abated against defendant no.2. Interlocutory order therefore according to the plaintiffs came to an end and the defendants' occupation become unauthorised and illegal. It was in this background that the suit came to be filed by the plaintiffs. The suit was resisted by the defendants - tenants

that they were the sub tenants since 1950 and their possession since 1950 admitted by the plaintiffs but according to the plaintiffs premises were given to the defendant on humanitarian grounds i.e. to the father of the defendant No.1 because the quarter of the company which was occupied by defendant Nos.1's father was required to be vacated and therefore the plaintiff permitted father of the defendant No.1 to temporarily occupy the part of their premises which is 10A. According to the plaintiffs the defendants have not paid any compensation or rent during all this period. There are no rent receipts or any document with the defendants in that regard and therefore the defendants being trespassers, were liable to be evicted.

4. The defence of the defendants was that that of a sub tenancy and they claim to be sub tenants of Shivappa. This claim was based upon a declaration allegedly made by Shivappa at Exhibit '1'. The trial Court framed the issues. Issues framed by the trial court with findings thereon are as under:

ISSUES

1. Does the Plaintiffs prove that Kumarappa Shivappa Medar was the tenant in respect of R. No.10, Ram Mandir, ground floor, G.D. Ambekar Road, Bombay - 12?

2. Does the plaintiffs prove that the defendants have become trespassers in respect of the suit premises?

3. Do the defendants prove that Shivappa s/o. Kumarappa was tenant in respect of the suit room?

4. Do they further prove that Ulleppa was jointly doing business with Shivappa in the suit room?

5. Do they further prove that Shivappa retired from business and left the room with Uleppa in 1953 executing a declaration?

6. Do they prove that Uleppa became tenant in respect of the said room?

7. What order?

FINDINGS :

1. Not needed to be proved as it is admitted.

2. Yes.

3. Not needed to be proved as it is similar to issue No.1.

4. No.

5. No.

6. No.

7. As per final order.

Ultimately the suit of the plaintiffs came to be decreed by the trial court in terms of prayer (a) of the plaint and therefore the defendants have filed this Appeal.

5. Counsel for the appellants contended that, firstly, there was no evidence with the plaintiffs to show that they were the tenant in respect of the entire room below one roof which included 10A and 10B and whatever has been proved by the plaintiffs was at

the most their tenancy in respect of 10B and therefore they could not claim any right in respect of 10A in possession of the defendants. Further it was contended by counsel for the appellants that failure of the defendants to prove their claim of sub tenancy would not help the plaintiff because the plaintiff must succeed on the strength of their evidence and therefore even if alternatively it is held that the defendant has failed to prove that they are sub tenants of Shivappa that could not help the plaintiff in getting the decree of possession. My attention was drawn to the evidence laid down by the parties and the documents proved by the counsel for the appellants and the respondents.

6. Counsel for the appellants drew my attention to paragraph 8 of the judgment of the trial court in support of his contention that the plaintiffs were the tenants of only half of the premises i.e. 10B. Wherein the trial court has held : **"From the evidence of PW 1 it has transpired that their community Samaj known as Medar Samaj paid the rents, electricity bills as well as sessment bills in respect of the suit premises. The rents paid for the half portion of the premises. The assessment bills are paid entirely, the electricity bills are also paid for half the portion of the premises which is in the use and occupation of the plaintiffs."** Therefore,

the counsel for the appellants contended that if the plaintiffs were tenants of only half of the premises i.e. 10B then they could not lay any hand on the other portion of the premises i.e. 10A in possession of the defendants. I am not in agreement with this submission. The question is whether the plaintiffs ' grand father permitted the defendant's grand father to occupy the premises in their possession or over which the plaintiffs grand father has a control. This fact is proved by the evidence of the plaintiffs wherein it is stated that father of Defendant No.1 and the father of P.W. 1 were colleagues in Bombay Municipal Corporation. The father of the defendant No.1 Ullappa was working in Bombay Dying Spring Mills and was living in Bombay Dying Spring Mills Chawl but after his retirement he had no place to live, therefore father of P.W. 1 accommodated Ulleppa in the remaining part of the premises. There are no reasons to disbelieve this story and theory of the plaintiffs and the stand taken by the defendants that he was the sub tenant of Shivappa also strongly support the case of the plaintiff that it was the plaintiffs ancestor who put the Uleppa in the premises. If that is so then whether the plaintiffs are tenants of half of the premises or of full is of no consequence. The question is whether Ullappa was permitted originally to occupy the premises by the father of P.W. 1 and if the answer is in the

affirmative it clearly means that father of P.W. 1 had right, authority and control over the other part of the room i.e. 10A which he could give to Uleppa. This gives therefore a right to the present plaintiffs to claim back their possession.

7. Once the court come to the conclusion, which has been rightly held by the trial court that the plaintiffs had a right to claim back possession then the burden shifts on the defendants to prove that he was a sub tenant of Shivappa. Now, in order to prove his contention the defendants has admittedly not a signle document in his favour, viz. there is any agreement of sub tenancy between Uleppa and father of P.W. 1 nor any other document in possession of the defendants about payment of rent either to father of P.W. 1 or to P.W. 1 thereafter. To the contrary the suit filed by the defendants before the Small Causes Court came to be dismissed as abated and the suit was not prosecuted further by the defendant. This clearly shows that the defendants did not succeed in proving his right to room No.10A as a sub tenant.

8. Parties may claim and contend anything in their pleadings in order to protect their rights but unless they prove their contentions by evidence acceptable to the court, they cannot succeed.

Therefore, it was easy for the defendants to contend that they were sub tenants of Shivappa but difficult to prove accepting the statement on oath in the court. Tenancy or sub tenancy is a matter of contract or agreement between the parties and there is not even a single circumstance to come to the conclusion that there was any oral agreement of sub tenancy between Uleppa and father of P.W. 1 or between the defendants and the plaintiffs at any time. The court has specifically came to the conclusion after the evidence of the parties that the defendants could not show payment of rent to anybody from 1957 till the date of the judgment. The trial court also came to the conclusion that the defendants failed to show any legal interest in the premises and therefore they could not be termed as anything but trespassers. Their possession was permissive and the plaintiffs were entitled to get it back. Defendants had not claimed adverse possession or hostile possession against the plaintiffs or plaintiffs predecessors in title.

9. It is true that plaintiffs must succeed on the strength of their own case, but this is a dispute between the parties in respect of their civil rights in an agreement of contract between the parties, therefore the burden equally lies on the defendants to prove their case of sub tenancy. If the

defendants have not a single document in their possession to prove any agreement between Uleppa and father of P.W. 1 and if the defendant has no rent receipts or receipts of payment of any rent or compensation in their occupation, then no other inference can be drawn by the court but one of the defendants being trespassers.

10. Though the trial court has referred to Exhibit '1' which is a declaration made by Shivappa on stamp paper, no submissions were made by the counsel for the appellants in that regard. However, Paragraph 12 of the judgment of the trial court shows that even that important document of the defendants was considered by the trial court and rejected. Perusal of Exhibit '1' shows that it is a declaration of Shivapa on a stamp paper of 9.11.1953. The declaration is as under:

1. The Bamboo business was carried on jointly by me and Shri Uleppa Bhimappa at the above address. We did not have any writing about the said partnership.

2. The licence of the said business stands in my name as I am an elderly man.

3. Shri Uleppa Bhimappa is releated to me.

4. Now that I have grown old I have retired from the business and Shri Uleppa Bhimappa is carrying on the same.

5. Shri Uleppa Bhimappa is now the sole owner of the business and I have no objection to transfer the Licence of the said business to his name. I have not taken any consideration from Shri Uleppa Bhimappa."

Declaration of Shivappa at Exhibit '1' therefore clearly show that there is no reference to room No.1 nor Shivappa had created any right to Uleppa in the said room in any manner whatsoever. The declaration is restricted to the business between them and does not speak of any kind of right whatsoever about the room. Therefore, this document is of absolutely no help to the defendant in proving their case. To the contrary it supports the case of the plaintiff that Uleppa and Shivappa were friends and therefore on humanitarian grounds Shivappa gave the premises to Uleppa when he was in dire need of some shelter above his head.

11. This is therefore a case where the plaintiffs have succeeded in proving his right to the property and the defendants have utterly failed to prove their right to the suit property. The

dismissal of the defendants suit before the Small Causes Court and is non prosecution thereof had abated the suit also clearly show that there were compelling circumstances for the defendants not to proceed with the declaratory suit. Judgment of the trial court is well reasoned one. No interference is called for.

12. In the result, I pass the following order:

ORDER

. Appeal is dismissed. No order as to costs. Stay stands vacated.

11.2.2005 (D.G. DESHPANDE,J.)

. After this order was pronounced, counsel for the appellants prayed for continuation of stay for eight weeks. Prayer was strongly opposed by the counsel for the Respondents. I do not find any merit in the prayer as two courts have consequently come to the same conclusion, therefore prayer for stay is rejected.

11.2.2005 (D.G. DESHPANDE, J.)